Supreme Court, U.S.
FILED
JAN 21 1992
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91-1191

No.

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1991

RICHARD P. HECKER, Petitioner

v.

FRANKLIN NATIONAL BANK, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, NO. 89-7255

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Was petitioner ineligible for a bankruptcy discharge under the Bankruptcy Act fraud exception of 11 U.S.C. § 523 (a)(2)(A) by acting with "reckless disregard of the truth" in pledging his corporate stock for a $50,000 bank loan without actual knowledge that the stock was restricted?

II. Did petitioner make a "false representation" for "fraud" purposes where his corporate stock was restricted, but a prior financial statement showed the shares as "restricted", and the stock did have some (undetermined) value as collateral?

III. Did petitioner "intend to deceive" the bank when he acted on recommendation and advice of corporate counsel?

IV. Did petitioner have both requisite "knowledge" and "intent to deceive" when he acted on advice of corporate counsel, and the documents he originally signed imposing restrictions on the transfer of the stock indicated the restrictions did not apply upon receiving a favorable opinion of corporate counsel?

V. If petitioner did misrepresent the stock restrictions to the bank, did the bank actually rely on these misrepresentations, and, if so, was

this reliance "reasonable"?

VI. Did petitioner's conduct constitute "proximate cause" of the loss when the creditor bank, having the burden of proof as the plaintiff in the Bankruptcy Court, failed to prove at trial the stock had insufficient collateral value at the time of the stock pledge and loan?

VII. Does a bona fide, good faith recipient of restricted publicly-traded stock as collateral have the right to liquidate the security on default free of the restrictions?

PARTIES

Petitioner: Richard P. Hecker

Respondent: Franklin National Bank

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Statutes/Regulations:	Pages
11 USC § 523(a)(2)(A)	16, 31, 47, 55
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REFERENCE TO OTHER REPORTS

(All Unpublished)

1. Oral Decision of Bankruptcy Judge November 21, 1988 (App. pp. 25-69).

2. Bankruptcy Judge's Decision Granting Motion to Amend Judgment, and Judgment, dated January 6, 1987 (App. pp. 70-90 and pp. 91-93).

3. Opinion of U.S. District Court sitting as Appellate Court-Judge Harold H. Greene, September 22, 1989 (App. pp. 94-113).

4. U.S. Court of Appeals Decision, October 23, 1991 (App. pp. 2-5).

STATEMENT OF GROUNDS FOR JURISDICTION

1. Date of Entry of Judgment Sought to be Reviewed: October 23, 1991.

2. Relevant Statutory Provision:

28 U.S.C. § 1254 (1)

CONSTITUTIONAL PROVISIONS, TREATIES STATUTES, ORDINANCES AND REGULATIONS INVOLVED

11 U.S.C.§ 523(a)(2)(A):

(a) A discharge under Section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

.....

(2) for money, property, services, or extension, renewal, or refinancing of credit, to the extent obtained, by-

(A) false pretenses, a false representation or actual fraud, other than a statement respecting the debtor's or an insider's

financial condition....

15 U.S.C. Section 771

Any person who-

(1) offers or sells a security in violation of section 77e of this title...

shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

Regulation §230.144-SEC

17 C.F.R. §230.144

...

(b) Conditions to be Met. Any affiliate or person who sells restricted securities of an issuer for his own account, or any person who sells restricted or any other securities for the account of an affiliate of the issuer of such securities, shall be deemed not to be engaged in a distribution of such securities and therefore not to be an underwriter thereof within the meaning of Section 2(11) of the Act

if all of the conditions of this rule are met.

STATEMENT OF THE CASE

1. Jurisdiction of Court of First Instance (Bankruptcy Court)

11 U.S.C. § 11

2. Statement of Facts

Petitioner, Richard P. Hecker (hereinafter "petitioner" or "Mr. Hecker") with his wife, Ellen F. Hecker, filed Chapter 7 bankruptcy on May 8, 1988 in the United States Bankruptcy Court for the District

of Columbia in case number 88-0274. Respondent, Franklin National Bank of Washington, D.C., Successor-In-Interest to National Enterprise Bank of Washington, D.C. (hereinafter collectively referred to as "respondent" or "bank"), filed a complaint to determine non-dischargeability of two outstanding loans to Mr. Hecker (AP No.88-0021). In October, 1986, the bank had loaned $50,000 to Mr. Hecker for the purpose of re-loan to Applied Optics, Inc., Mr. Hecker's employer. In 1987, that institution loaned another $13,200 to Mr. Hecker.

The Bankruptcy Judge ruled that the $13,200 loan was indeed dischargeable, but the $50,000 loan

was not dischargeable on the grounds of "fraud" as provided in 11 U.S.C. 523(a)(2)(A).

Mr. Hecker appealed the decision of the Bankruptcy Court to the United States District Court for the District of Columbia in case number 89-0323. The District Court Judge affirmed the decision of the Bankruptcy Judge on the grounds that none of the findings of the Bankruptcy Judge were clearly erroneous. Mr. Hecker appealed to the United States Court of Appeals for the District of Columbia Circuit in case number 89-7255. The Court of Appeals affirmed the decision of the District Court, also on the same grounds.

The recipient of the $50,000 proceeds, Applied Optics, Inc., manufactured contact lenses in Maryland (App. pp. 16-18). On March 1, 1985 petitioner joined Applied Optics as an executive vice president, secretary and treasurer (App. pp. 16-18). He also supervised payroll, purchasing and personnel (App. pp. 16-18). Petitioner had no training or experience in securities when he joined the corporation (App. pp. 19-21). He had never participated in any other public corporation (App. pp. 19-21).

Approximately September 26 or 28, 1985, Applied Optics, Inc. went public (App. pp. 18-19). In

conjunction, on July 24, 1985, petitioner signed about 150 to 200 documents (App. pp. 19-21) prepared by the corporation's attorney, Thomas Prousalis (App. pp. 19-21). An SEC S-18 public registration form and stockholders agreement (See pp. 105-106 at App. pp. 114-115) were filed on August 22, 1985, signed by five shareholders. Petitioner signed in his capacity as secretary of the corporation (App. pp. 15-17).

Both a public stock offering prospectus and the shareholders agreement restricted the transfer and/or sale of the petitioner's stock for three years from August 22, 1985. The provisions were worded in effect, "Shareholders

shall not sell, pledge, hypothecate, donate or otherwise transfer their shares of common stock" (App. pp. 15-16). However, the terms of the restriction also provided for relief from these restrictions "...UPON THE ISSUANCE TO THE COMPANY OF A FAVORABLE OPINION OF ITS LEGAL COUNSEL AND/OR THE SUBMISSION TO THE COMPANY OF SUCH EVIDENCE AS MAY BE SATISFACTORY TO LEGAL COUNSEL TO THE COMPANY, IN EITHER CASE TO THE EFFECT THAT ANY SUCH TRANSFER SHALL NOT BE IN VIOLATION OF THE SECURITIES ACT OF 1933, AS AMENDED AND APPLICABLE STATE SECURITIES LAWS" (App. pp. 114-115). The petitioner received a favorable opinion from Applied Optics

corporate counsel before he pledged his stock as collateral on the $50,000 loan in question (App. pp. 22-25).

Well before making the subject loan of $50,000 in October, 1986, petitioner informed the bank of Applied Optics' new public stock offering. The bank was regularly kept apprised of the corporation's financial status (App. pp. 21-22).

Since the public offering was directly handled by Mr. Prousalis, the company's counsel, petitioner had a peripheral role. As a result of his limited role and non-securities background, petitioner mistakenly thought these restrictions lasted only 24 to 30

months from the time of the original incorporation approximately December, 1983) (App. p. 45).

On or about March 3, 1986, about six months prior to the negotiations for the $50,000 loan, petitioner had filed a financial statement with the bank referencing his Applied Optics stock, which were listed as "restricted" (App. pp. 21). The bank's loan officer customarily reviewed old financial statements before making loans (App. pp. 7-9) and used that financial statement to make the $50,000 loan.

Mr. Hecker subsequently submitted another financial statement dated October 27, 1986, after receiving the October 3, 1986

loan of $50,000 at issue, listing the same shares of stock , but not showing them as restricted because of corporate counsel's favorable opinion that the stock could then be pledged as collateral (App. pp. 22-25)

Applied Optics' attorney, Thomas Prousalis, who handled all the company's security work and stock certificate records, and kept petitioner's publicly traded shares, had advised and suggested to petitioner to use all his Applied Optics shares to obtain the $50,000 bank loan for the benefit of Applied Optics (App. pp. 23-25). On approximately September 23, 1986, petitioner acted on attorney

Prousalis' recommendations, and he contacted the bank about using his stock as collateral for the $50,000 loan (App. pp. 33).

On October 3, 1986, when Mr. Hecker actually borrowed the $50,000 from the bank, he believed the corporation was financially unable to borrow it on its own. He was, however, advised by attorney Prousalis that he could take out a "personal loan" (App. pp. 23-25) and turn the proceeds over to the corporation. Petitioner had told counsel that he had no property upon which to borrow (App. pp. 25). Petitioner was unaware of the continuing validity of any stock restrictions (App. pp. 22-23).

The bank did not have any established procedures for determining whether the stock was validly issued to a person presenting stock certificates as collateral. The bank never made the simplest inquiries into the validity of the shares (App. pp. 7-11), and never inquired of petitioner whether the stock was restricted (App. pp. 7-11).

Apparently, the loan officer never checked with the SEC, despite knowing that the corporation had relatively recently gone public, and Mr. Hecker's status in the corporation, and that therefore insider shares were almost certainly subject to SEC restrictions (App.

pp. 7-11). Further, the loan officer never asked the corporate attorney, nor anyone about possible stock restrictions (App. pp. 7-11).

Thus the loan officer did nothing to verify the validity of the stock certificates (i.e., whether the shares were validly issued so they could be traded or if restrictions applied) (App. pp. 7-11). The loan officer did, however, check the value of the stock in the Wall Street Journal and with a brokerage firm, Charles Schwab (App. pp. 7-11).

With the $50,000 loan taken on October 3, 1986 upon advice of counsel (App. pp. 23-25), petitioner bought Applied Optics stock, and

lent the rest of the money to the company. (App. pp. 12-13) The company was having financial troubles at this time (App. p. 13). The loan proceeds were used by the corporation for normal operating expenses, including payroll (App. p. 48).

Mr. Hecker made timely payments throughout the term of the loan until the full principal and interest came due about one year after the loan. Petitioner did not learn that the stock shares he had pledged to the bank were "restricted" until just prior to the due date, in August or September of 1987. When the bank informed him, the petitioner was "shocked" (App.

pp. 14-15).

A few months previously, petitioner had also obtained a second loan from the bank, a consumer loan for $13,200. The Bankruptcy Court held that this $13,200 loan to be dischargeable because there was no indication that any of the Applied Optics shares were pledged as collateral (App. pp. 48-50).

Concerning the first loan of $50,000, however, the Bankruptcy Court held that it was not dischargeable on the grounds that the petitioner "fraudulently" failed to disclose existing stock restrictions. The Court ruled that Mr. Hecker showed a "reckless

disregard of the truth", from which the Bankruptcy Court declared, "an intent to deceive may be found" (App. pp. 54-57). The Court also found that the bank reasonably relied on the petitioner's pledge of his shares of stock (App. pp. 61-63).

Finally, the Bankruptcy Court found that the bank sustained a loss as a proximate result of petitioner's alleged misrepresentation of omission (failure the disclose stock restrictions) because almost all the shares pledged were restricted at the time of default on October 2, 1987. The Bankruptcy Court ignored the issue of the stock share's

salability and value until its subsequent "Decision Granting Motion To Amend" (App. pp. 83-85).

The Bankruptcy Court awarded the bank $50,000, plus interest, and 15% attorney's fees, a total of $64,761.10. The Court had originally awarded only the value of the shares at the time of the default, plus attorney's fees. Later, the Court reversed itself (App. pp. 70-90).

Petitioner now seeks review of the non-discharge of his $50,000 loan obligation.

ARGUMENT IN FAVOR OF ALLOWANCE OF WRIT

THE WRIT SHOULD BE GRANTED BECAUSE, IN GENERAL, IN A TIME OF ECONOMIC RECESSION AND BANK FAILURES, THE PARAMETERS OF BANKRUPTCY DISCHARGE EXCEPTIONS AND RIGHTS OF GOOD FAITH HOLDERS OF RESTRICTED STOCK AS COLLATERAL HAVE PARTICULAR IMPORTANCE; MORE SPECIFICALLY THE COURT HAS THE OPPORTUNITY HEREIN TO DETERMINE HOW STRICTLY THE DISCHARGE EXCEPTION OF 11 USC § 523(a)(2)(A) SHOULD BE CONSTRUED, AND TO CLEAR UP THE CONFLICT AMONG AND WITHIN THE CIRCUITS ON THE REASONABLE RELIANCE REQUIREMENT.

A. The Burden Of Proof Is On The Creditor To Prove By Clear And Convincing Evidence Each Of The Elements Of Any Exception To Discharge (Here "Fraud"); The

Creditor's Evidence In The Bankruptcy Court Trial Failed To Establish "Fraud".

To prove the 11 U.S.C. 523(a)(2)(A) exception to discharge, a creditor (such as the respondent bank here) must show in Bankruptcy Court: (1) that the debtor [petitioner here] made a representation or statement, (2) that it was false, (3) that it was made with intent to deceive, and (4) with either actual knowledge that it was false or gross recklessness as to its truth, (5) that respondent relied on it, (6) that reliance was reasonable, (7) that the creditor [respondent] suffered a loss, and

(8) that loss was proximately caused by debtor's conduct. In Re Nahas, 92 B.R. 726 (E.D. Mich. 1988).

The creditor must prove all of the elements of the test for fraud, by a preponderance of the evidence. Grogan v. Garner, 111 S. Ct. 654, 112 L.Ed. 2d 755 (1991). Exceptions to discharge are to be construed strictly. In Re Jackson, 89 B.R. 308, 313 (Bankr. D. Mass. 1988). This resistance to discharge exceptions is used to afford the debtor a "fresh start." See: Local Loan Co. v. Hunt, 292 U.S. 234, 54 S. Ct. 695, 78 L.Ed 1230 (1934).

1. The Trial Evidence Was Not Legally Sufficient To Establish

"Fraud" Because Petitioner Never Made Any False Statement or Willful Misrepresentation.

The Bankruptcy Judge ruled petitioner's false representation or willful misrepresentation was that the petitioner "recklessly" pledged stock shares to the bank which were not restricted. (App. pp. 52-57) The Bankruptcy Judge's ruling on this point was clearly erroneous, inter alia, because he used the term, "reckless", and did not find gross recklessness as required. In Re Nahas, supra. That is, a review of the evidence shows that whatever mistakes petitioner might have made, he did not engage in the moral

equivalent of driving 65 miles per hour in a 20 mile-per- hour school zone with children present.

Further, the Bankruptcy Judge misstated the issue. The bank was not concerned with the technicalities of the stock restrictions, only with receiving stock shares with sufficient value as collateral for the loan. The bank officer said he would not have made the loan without some adequate security. See App. p. 7.

The Bankruptcy Judge erroneously stated in his opinion: "If the stocks were restricted, they couldn't be pledged...." App. p. 56. Although SEC Rule 144 and the Shareholders Agreement (App. pp.

114-115) executed as part of the public offering transaction generally banned stock pledges for a certain period, the remedies for such transgressions would include enhanced liabilities for petitioner, but would not adversely affect the bank as a bona fide recipient of the stock as collateral (unless petitioner's March, 1986 financial statement showing the shares as restricted would take the bank out of this status-App. p. 21). As stated in ADM Corp. v. Thomson, 707 F.2d 25, 27 (1st Cir. 1983), "The Securities Act does not by its terms automatically invalidate sales of unregistered securities in violation of § 5. Rather, when unregistered

securities are sold illegally, the Act simply grants the buyer a remedy, § 12(1). 15 USC § 771(1)."

Thus, such restricted shares in a private transaction with a sophisticated party such as a bank can have value. Edina State Bank v. Mr. Steak, Inc., 487 F.2d 640 (10th Cir. 1974). As a result, the true issue at trial was not the presence or absence of restrictions at all, but whether the (restricted) shares had collateral value. The bank having the burden of proof never offered evidence on this value, nor any attempt to sell the stock, and thus, no evidence as to why not. See App. p. 69. The Bankruptcy Judge, therefore, erred, when he

stated, "...upon the Bank's inquiry...it was determined that the shares could not be sold." App. p. 83.

Finally, petitioner could not "misrepresent" facts of which the bank was aware. That is, petitioner submitted just six months before the loan transaction at issue, a financial statement the bank officer testified he used to make the loan, disclosing the restrictions. (App. pp. 7-9)

2. The Bankruptcy Judge Could Not Make A Legally Sufficient Finding Of "Fraud" Because There Was

No Required "Intent To Deceive," Since Corporate Counsel Sanctioned the Transaction.

The trial evidence was not sufficient to sustain a finding of "intent to deceive" for two reasons: (1) As stated in section 1. immediately above, the stock which petitioner pledged did have value, which the bank never proved was insufficient; the bank was concerned with collateral value, not restrictions (See App. p. 7); (2) the whole loan idea originated from Applied Optics' counsel, who in effect provided his unqualified opinion to petitioner that he should and could pledge the Applied Optics

stock shares at issue.

The Bankruptcy Judge himself acknowledged that corporate counsel originated the entire loan concept (App. pp. 45-48) and that petitioner did consult corporate counsel about pledging the shares (App. pp. 45-48). Petitioner testified he was aware of possible restrictions (App. pp. 11-12), but understood that no restrictions applied, since corporate counsel advised him to pledge the stock (App. pp. 22-25). Indeed, petitioner's understanding was eminently reasonable because the terms of the stock restriction provided that transfers (including, of course, pledges) were permissible in the case of "a favorable opinion

of its [Applied Optics'] legal counsel". See App. pp. 114-115. At the same time, petitioner was not experienced at public offerings and his knowledge in this regard was quite limited. (App. pp. 16-20).

Meanwhile, substantial legal authority supports petitioner in his assertion that "intent to deceive" cannot be found where the debtor reasonably relies on the best "available source of knowledge". Morimura v. Taback, 279 U.S. 24, 33 (1929). What more could the petitioner possibly do to verify the stock restriction transaction than to consult the attorney who supervised the corporation's public stock offering and originated the

concept of the petitioner's stock pledge? See: O'Reilly v. Endicott, 297 F.2d 1 (1961); Kentile Floors, Inc. v. Winham, 440 F.2d 1128 (9th Cir. 1971) (Discharge upheld in circumstances of bookkeeper error and misrepresentation of legal advice); In Re Jackson, supra. (Discharge upheld in circumstances of accountant and attorney advice).

3. Petitioner cannot be said to have acted with knowledge of, or gross recklessness as to the truth of, either the restrictions or the actual share value.

As to the "knowledge" element, the Bankruptcy Judge found against petitioner on the basis of ignoring the possible continuing validity of stock restrictions and proceeding with "reckless disregard of the truth" (App. pp. 54-57) As stated, the Bankruptcy Judge (impermissibly) failed to make a finding of "gross recklessness", as characterized In re Nahas, supra. In the absence of actual knowledge, the requirements of gross recklessness, as opposed to

"ordinary" recklessness, is consistent with the "fresh start" principle. Further, the Bankruptcy Judge's "reckless" finding flies in the face of petitioner's consultation of the best possible source on the legal status of the corporation's stock shares, the corporate attorney.

On the other hand, based on the discussion above concerning the Bankruptcy Judge's legal error when he assumed lack of value of the restricted shares, we must also consider petitioner's knowledge of the value of the shares, assuming restrictions. That is, the Bankruptcy Judge erroneously stated "If the stocks were restricted, they

couldn't be pledged, and the debtor necessarily would be aware that he was misleading the bank...." App. p. 56. We have already demonstrated above that restricted shares could be pledged with a favorable opinion from counsel, that even restricted shares have value, and that bank representatives testified at trial that they were only concerned with the value of the collateral, not the precise legal posture of the shares.

Meanwhile, the bank introduced no trial evidence on the actual value of the shares, as restricted, despite its having the burden of proof. Therefore, no matter what knowledge petitioner did or did not

have about restrictions, an essential element of the bank's required proof of petitioner's knowledge is missing, actual value of the stock, even if restricted. As long as the shares were sufficiently valuable to serve as collateral, petitioner's conduct cannot be fraudulent as he would necessarily have no knowledge whatsoever of the unsuitability of the shares as collateral.

4. Assuming Misrepresentation Did Occur, The Bank Failed To Demonstrate Actual or "Reasonable" Reliance (Which Is The Subject Of Conflicts Within And Among Circuits)

The bank's representatives at trial testified only that the bank sought sufficient collateral value of the shares, not whether or not restrictions made any difference. The bank representative's exact words were, "I would not have made the loan if we did not have the stock certificate, the value of the stock...of the $50,000" (App. p. 7). There was no other testimony on this point.

Having the burden of proof,

the bank did not prove anything more than its concern about stock value, not restrictions. Thus, there was no proof that the bank actually relied on the purported petitioner's misrepresentation about stock restrictions, nor any proof that the actual value was less than the $50,000 desired.

Even if misrepresentation as to stock restrictions is found and the bank actually relied on such misrepresentations about restrictions, this reliance must also be "reasonable" to establish the 11 U.S.C. § 523(a)(2)(A) fraud exception, in the view of most federal courts. Some courts, however, do not impose any

requirement of reliance being "reasonable" in applying Section 523(a)(2)(A). See In Re Phillips, 804 F.2d 930, 932-33 (6th Cir. 1986), citing In Re Sobel, 37 B.R. 780, 785-86 (Bankr. E.D.N.Y., 1984) and In Re Fosco 14 B.R. 918, 921-23 (Bankr. D. Conn. 1981). See also In Re Ophaug, 827 F.2d 340 (8th Cir. 1987) and In Re Showalter, 86 B.R. 877 (Bankr. W.D. Va. 1988).

In the Eleventh Circuit there is uncertainty and even conflict on this issue of whether reliance must be reasonable. See In Re Firestone, 26 B.R. 706 (Bankr. S.D. Fla. 1982) (Court uncertain about "reasonable" reliance requirement, but probably no such requirement), and In Re

Lilienfield, 36 B.R. 724 (Bankr. S.D. Fla. 1984) and In Re Wise, 6 B.R. 867 (Bankr. M.D. Fla. 1980) ("reasonable" reliance is required).

There is a similar, yet sharper, conflict in the Second Circuit. While In Re Fosco, and In Re Sobel, supra, make no requirement of "reasonable" reliance, In Re Newmark, 20 B.R. 842, 861-862 (Bankr. E.D.N.Y. 1982) holds that the "fresh start" doctrine requires rigorous proof from the creditor that reliance was "reasonable".

The "rigorous" view is shared by the Tenth Circuit. See In Re Mullet, 817 F.2d 677 (10th Cir. 1987). In contrast, the Sixth Circuit (In Re Phillips, supra) and

the Seventh Circuit (In Re Garman, 643 F.2d 1252 (7th Cir. 1980)) have adopted the "reasonable" reliance requirement, but do not require rigorous creditor proof. The creditor fails to establish "reasonable" reliance when "a creditor's claimed 'reliance'.... would be so unreasonable as not to be actual reliance at all." In Re Garman, supra, at p. 1256.

Even in such "low threshold" reasonable reliance jurisdictions, the creditor has been held unable to establish "reasonable" reliance. See for example, In Re Ward, 857 F.2d 1082 (6th Cir. 1988). In that case, a discharge exception for "fraud" was denied when a bank

failed to check the credit history of the debtor, which would have revealed massive difficulties. The court quoted (at p. 1084) In Re Mullet, supra, in support of its position as follows: "In cases where 'minimal investigation and verification almost certainly would have uncovered the falsity of the representation,' a bank's debt must be discharged if no such investigation had been performed."

In the present case, the bank never conducted even a minimal investigation into the stock's suitability for a pledge, nor ever checked the corporation's SEC filing to ascertain whether or not the stock was restricted (which could

have been required at the borrower's expense) (App. pp. 7-11). The bank did not even ask Mr. Hecker, or anyone else, (such as the corporate attorney) whether there might be encumbrances or restrictions on the stock. App. p. 9.

Further, respondent made loan in spite of the petitioner's financial statement at the bank, which listed the stock as "restricted". App. p. 7-8. Finally, the bank completely ignored SEC regulations which imposed restrictions on Mr. Hecker's stock as part of a public offering, although it had been dealing with Mr. Hecker for many months and knew his corporate status. SEC Reg. §

230.144, Securities Act of 1933 (Rule 144), 17 C.F.R. § 230.144

Hence, the respondent did not use ordinary care in a loan to petitioner when it had investigative resources available to it requiring minimal or no expense. Indeed, given the bank's failure to establish at trial that the pledged stock had inadequate collateral value, it can be argued effectively there was in fact no reliance on the purported misrepresentations about restrictions.

5. The Bank Also Failed to Establish The Final Element of the Fraud Exception, That the Alleged Misrepresentations Were The Proximate Case of the Loss

We have established herein that the bank could have sold the shares at issue. At the same time, we have discussed how the bank never made any attempt to sell the stock, while never explaining why. (App. p. 69). Thus, the bank, bearing the burden of proof, never supplied a link in its proof necessary to sustain a finding of fraud: that the value of the saleable collateral stock was insufficient to cover its loss.

B. Conclusion

The writ should be granted because of the opportunity for this Court to define the parameters of the "fraud" exception to bankruptcy discharge, particularly in Section 523(a)(2)(A) cases. The Court can also address an important securities issue, whether a bona fide, good faith recipient of restricted publicly-traded stock as collateral is entitled to liquidate the security on default, free of the restrictions. Still further, the Court would have a prime opportunity to settle the law on "reasonable" reliance, should the Court find against petitioner's powerful

argument that he never engaged in "fraud" in the first place. Petitioner relied on corporate counsel and did pledge saleable stock of some significant value, very possibly sufficient in collateral value to cover the loss. That value was never established at trial, despite the bank's burden of proof. Whatever the value, the conduct of a debtor such as this petitioner cannot be adjudged "fraud" where pledged stock shares, though restricted, were saleable and did have value.

Respectfully submitted,

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Admitted: August 20, 1979

CERTIFICATE OF SERVICE

I, Christopher A. Teras, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari, together with the Appendix thereto, was on January 21, 1992 duly deposited in the United States Mail, postage prepaid, addressed to:

M. Michael Cramer, Esq.
Attorney for Respondent
Cramer & Klopman Chartered
216 North Adams Street
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_____
Christopher A. Teras